

1                    BEFORE THE BOARD OF PERSONNEL APPEALS  
2                    \* \* \* \* \*

3                    IN THE MATTER OF:

4                    MISSION FEDERATION OF TEACHERS,  
5                    LOCAL #3182, AFT, AFL-CIO,

6                    Complainant,

7                    DLP #33-76

8                    -v-

9                    BOARD OF TRUSTEES OF SCHOOL,  
10                  DISTRICT #28, SAINT IGNATIUS,  
11                  MONTANA,

12                  FINDINGS OF FACT,  
13                  CONCLUSIONS OF LAW,  
14                  AND RECOMMENDED ORDER.

15                  Defendant.

16                  \* \* \* \* \*

17                  On September 30, 1976, the Mission Federation of Teachers,  
18                  Local #3182, AFT, AFL-CIO (referred to herein as the Complainant,  
19                  the Federation, or the teachers) filed an unfair labor practice  
20                  charge with the Board of Personnel Appeals against the Board of  
21                  Trustees of School District #28, Saint Ignatius, Montana  
22                  (referred to herein as the Defendant, the School Board, or the  
23                  Board).

24                  The charges, amended by Complainant's Reply to Order for  
25                  More Definite Statement filed with the Board of Personnel Appeals  
26                  November 15, 1976, and by motion granted at the hearing, alleged  
27                  that Sections 59-1605(1)(a) and (e), R.C.M. 1947, were violated  
28                  in that the School Board interfered with, restrained, or coerced  
29                  employees in the exercise of the rights guaranteed in Section  
30                  59-1603, R.C.M. 1947; and refused to bargain collectively in  
31                  good faith with an exclusive representative.

32                  The School Board denied the charges in an answer and an  
33                  amended answer, filed with the Board of Personnel Appeals  
34                  December 6, 1976, and December 29, 1976, respectively.

35                  Therefore a hearing on the matter was held February 5, 1977,  
36                  in the High School Library of School District #28, Saint Ignatius,  
37                  Montana. The Federation was represented by Mr. Joseph W. Duffy

1 of the law firm of McKittrick and Duffy, Great Falls, Montana.  
2 Mr. Edward E. Duckworth, Deputy Lake County Attorney, Polson,  
3 Montana, represented the School Board.

4 As the duly appointed hearing examiner of the Board of  
5 Personnel Appeals, I conducted the hearing in accordance with  
6 the provisions of the Montana Administrative Procedure Act  
7 (Section 82-4201 to 82-4225, R.C.M. 1947).

8 RULINGS ON MOTIONS UNDER ADVISEMENT

9 Complainant's Motion to Amend Petition, made at the hearing  
10 and argued in Complainant's Post Hearing Brief, based on Section  
11 24-3-8(6)-8855 of the Rules and Regulations of the Board of  
12 Personnel Appeals, and not contested by Defendant, is hereby  
13 granted.

14 Defendant's Motion for Continuance is hereby denied,  
15 Defendant having proceeded on the substance for the additional  
16 unfair labor practice alleged and the hearing examiner considering  
17 the record adequate to address the charge.

18 FINDINGS OF FACT

19 After a thorough review of the entire record of this case,  
20 including sworn testimony, evidence, and briefs, I make the  
21 following findings:

22 CHARGE AS STATED IN COMPLAINANT'S REPLY  
23 TO ORDER FOR MORE DEFINITE STATEMENT:

24 That prior to November 4, 1976, the Board of Trustees  
25 had insisted during negotiations that the employees  
26 accede to a salary index (specifically the Montana  
27 Employees Association [mea] Index #U) which has no  
28 relationship to these employees, is, in fact, a  
29 salary index applicable to another Union and which  
constituted an unreasonable attempt by the Board of  
Trustees to impose conditions upon this bargaining  
unit which constituted interference and restraint  
of these employees' collective bargaining rights  
and constituted failure to bargain in good faith.

- 30 1. The School Board's salary offers were generally  
31 based on MEA Attainment Level 4. (Fisher, Erickson)  
32 2. According to testimony, the School Board generally based

1 its salary offers on NSA Attainment Level 4 because:

2 a. It desired to create a more equitable salary schedule.

3 The following testimony of Mr. Mike Fisher, chairman of the  
4 School Board and its chief negotiator, given under direct  
5 examination as an adverse witness, is explanatory:

6 Mr. Duffy: I recall your answer to my question  
7 about why you utilized this schedule, the Montana  
8 Education Association, is that it was your desire  
9 to create a more equitable salary schedule. Is that  
correct?

10 Mr. Fisher: Yes.

11 Mr. Duffy: Could you state for me and for the  
12 record what you mean by a more equitable salary  
13 schedule?

14 Mr. Fisher: I'm talking about the increments  
15 that the teachers earn in their years of experience  
16 or as they advance in the education areas.... On  
17 the 75-76 salary schedule, for example, a teacher  
18 who is at a B.A., after he's here a year, when he  
19 goes to two years experience, his increment on this  
20 schedule may have been \$450 at this point. Then  
the next year, from the second to the third year,  
his increment may have been \$110. And then the  
third year to the fourth year his increment again  
may have been \$450. To the Board and to the negotiators  
this was not, we felt that this was not an equitable  
salary schedule for all staff. In fact, on that  
salary schedule a teacher who finished his fifth  
year of, or who was at a fifth year and if he  
completed his Masters he would in fact lose \$7.

21 (tape 336)

22 b. It desired to maintain competitive base salaries to  
23 attract good, qualified teachers into the system without  
24 raising the salaries of the more experienced and educated  
25 teachers so high that the schedule would not be affordable  
26 by the school district. (Fisher)

27 3. The Federation's salary proposals were generally based  
28 on across the board percentage increases over the 1975-1976  
29 salary schedule. (Fisher, Erickson)

30 4. According to testimony, the Federation desired an across  
31 the board percentage increase because:

32 a. This was the desire of the teachers, whose guidelines

1       were pursued by their negotiating team at the table.

2       b. It desired to maintain buying power.

3       c. It considered an across the board percentage

4       increase more equitable than the School Board's

5       proposal under which some teachers would have received

6       higher increases than others.

7       d. It believed that teachers should have some input

8       into decisions relating to the distribution of the

9       total dollar amount. (Erickson)

10      5. According to testimony, the Federation was opposed to a  
11       salary schedule based on an MEA Attainment Level because:

12       a. The Federation was not affiliated with the MEA,

13       and didn't believe an MEA Attainment level should be

14       applied to it.

15       b. The teachers were not on a salary schedule based  
16       on an attainment level and did not wish to be.

17       c. The Federation's negotiators did not have information  
18       about attainment levels at their disposal. (Erickson)

19       6. The following contract history is relevant:

20       a. The salary schedule for the 1974-75 contract  
21       between the School Board and the Federation was  
22       based on MEA Attainment Level 5. (Erickson)

23       b. During negotiations for the 1975-76 contract  
24       between the School Board and the Federation, the  
25       School Board had wanted to go from MEA Attainment  
26       Level 5 to MEA Attainment Level 4. A compromise  
27       salary schedule off an attainment level which provided  
28       for percentage increases over the previous year's  
29       salaries was finally agreed to. (Erickson, Fisher)

30       7. The following aspects of negotiations between the

31       School Board and the Federation for the 1976-77 contract were

1 significant:

- 2       a. In March or April, 1976, the Federation indicated  
3       it would agree to a salary schedule based on MEA  
4       Attainment Level 5. (Erickson)
- 5       b. The fact finder's report, which was accepted by the  
6       School Board and rejected by the Federation, recommended  
7       a salary schedule "..., structured relatively close to  
8       attainment level 4 and 1/4 . . ." (Complainant's Exhibit  
9       A, Fisher)
- 10      c. In October or November, 1976, a two year package was  
11     proposed by the Federation which was based on a combina-  
12     tion of MEA Attainment Levels - "one year was one thing  
13     and another year was a different thing" (tape #78)  
14     (Erickson). Mr. Ron Erickson, spokesman for the Federa-  
15     tion's negotiating team, didn't recall if both years were  
16     based on MEA Attainment Levels. Mr. Fisher, testified  
17     that the Federation would have accepted MEA Attainment  
18     Level 4 for the first year as long as the second year  
19     salary schedule was based on MEA Attainment Level 5.
- 20      d. The contract finally agreed to by the parties  
21     contained a salary schedule not based on a MEA Attainment  
22     Level. (Fisher)

23                    CHARGE AS STATED IN COMPLAINANT'S REPLY  
24                    TO ORDER FOR MORE DEFINITE STATEMENT:

25     That on and after November 4, 1976, the employer  
26     gave these employees an ultimatum that they must  
27     accept the foregoing MEA Salary Index as a condition  
28     of employment and also refused to discuss the  
issue of retroactive pay in the collective bargaining  
sessions until after said employees had agreed to  
the unilateral demand.

29     8. At the November 4, 1976, negotiating session the School  
30     Board made a salary proposal and said that that was the last  
31     offer the School Board intended to make which would be retro-  
32     active to the beginning of the school year. (Fisher, Erickson)

9. The School Board, believing the matter of retroactive pay to be negotiable, was concerned about the increasing cost of retroactive pay involved and "after eleven months negotiating ... needed something to bargain with...." (tape 1576) (Fisher)

19. The Federation felt it had been threatened by this statement of the School Board; that if it did not agree to this offer of the School Board any other schedule at any other time would not be retroactive. (Erickson)

III. The Federation considered this issue of retroactivity to be a negotiable item. (Erickson)

12. The issue of retroactivity "had come up earlier, but in a different context and under different circumstances...."  
(tape 844) (grlckson)

13. In negotiating sessions held subsequent to November 4, 1976, no salary proposal was made by the School Board which did not include retroactive pay. (Fisher)

14. The final settlement included retrospective pay (Richard).

CHARGE AS STATED IN COMPLAINANT'S CHARGE  
AGAINST EMPLOYER (THE SCHOOL BOARD).

That during May, 1976, the employer by its officers, agents or representatives attempted to interfere with employees in the exercise of the rights guaranteed in Section 59-1603 R.C.M., 1947, by questioning and meeting with individual teachers on an individual basis concerning matters that were in the process of being negotiated by and between the union and the employer.

CHARGE AS STATED IN COMPLAINANT'S REPLY TO  
ORDER FOR MORE DEFINITE STATEMENT.

... a teacher named Myrna Vandenburg was questioned by members of the Board of Trustees during the month of April, 1976. Specifically, she was questioned by the Chairman of the Board, Mike Fisher, about the negotiations that had taken place. The exact date during the month of April is unknown at this time to the Complainant, as is the exact location of the conversations.

CHARGE AS STATED IN COMPLAINANT'S POST  
HEARING BRIEF.

... that during negotiations the employer on at least one occasion attempted to undermine the Union's position by discussing the negotiations with individual teachers.

1 thereby bypassing the Union's role as collective  
2 bargaining agent for these employees. In this  
3 respect, these discussions with individual  
4 employees (Myrna Vanderburg, for example) were  
conducted in an atmosphere which created consider-  
able anxiety on the individual employee's part.

5 15. In April (Vanderburg) or May (Fisher) of 1976,  
6 Ms. Vanderburg, a teacher at Saint Ignatius, entered the district  
7 office to get hot water for tea. (Vanderburg, Bailey)

8 16. Mr. Fisher was in the district office working on  
9 salary schedules with Ms. Peterson, the district clerk, when  
10 Ms. Vanderburg entered the room. (Fisher, Bailey, Peterson)

11 17. A conversation regarding salary schedules ensued.

12 a. Ms. Vanderburg testified that Mr. Fisher handed  
13 her a piece of paper that was a School Board offer  
14 on MEA Attainment Level 4 and asked her if she'd  
15 seen it and what she thought of it. Mr. Fisher,  
16 Ms. Peterson, and Ms. Bailey, (the school's business  
17 manager), the only other people present, testified  
18 that they didn't recall Mr. Fisher handing a slip of  
19 paper to Ms. Vanderburg, that they only recalled  
20 Ms. Vanderburg joining in the ensuing conversation.

21 b. Ms. Vanderburg testified that while she  
22 "couldn't really tell... whether they [Mr. Fisher,  
23 Ms. Peterson, and/or Ms. Bailey] were exactly [trying  
24 to persuade her] to their point of view" (tape 1069),  
25 she felt in a position to defend the teachers' negotiators,  
uncomfortable, intimidated, like she was being  
26 interrogated, and like she "wanted out of there"  
27 (tape 1077).

28 c. Mr. Fisher testified that there was no heated  
29 exchange, that if Ms. Vanderburg felt uncomfortable  
30 in the situation she didn't show it, and that he would  
31 find it difficult to believe that Ms. Vanderburg would

1 feel intimidated or coerced by him because they're  
2 close friends.

3 d. Ms. Bailey testified that Ms. Vanderburg did  
4 not appear to feel intimidated; that she recalls  
5 nothing unpleasant about the conversation; that  
6 Ms. Vanderburg's participation in the conversation  
7 was voluntary; that Ms. Vanderburg was free to leave  
8 at any time; that there was no attempt to interrogate,  
9 coerce, interfere with, or restrain Ms. Vanderburg.

10 e. Ms. Peterson testified that there was no  
11 interrogation, coercion, interference, or restraint;  
12 that Ms. Vanderburg's participation in the conversa-  
13 tion was voluntary; but that Ms. Vanderburg was  
14 "getting a little uptight" (tape 1533) during the  
15 conversation.

16 CHARGE AS STATED IN COMPLAINANT'S POST  
17 HEARING BRIEF:

18 The employer on more than one occasion made offers  
19 which were either not meant to be taken seriously  
20 by the Union or were withdrawn while the Union was  
considering them or after the Union had accepted  
them.

21 18. At a negotiating session in May, 1976, a discussion  
22 of a salary schedule not on an attainment level was initiated  
23 by the School Board. (Erickson)

24 19. In the ensuing discussion of this salary schedule,  
25 the Federation's negotiators asked (a) for time to consider the  
26 salary schedule, (b) to take the salary schedule back to the  
27 teachers, a request denied by the School Board, and (c) whether  
28 this was an official offer, to which the School Board answered  
29 "no". (Second side of tape 019) (Erickson)

30 20. In the summation portion of the May 6, 1976, negotia-  
31 tion session minutes it was stated that the salary schedule in  
32 question was not a formal proposal of the School Board. This

1 was established by the following testimony:

2 Mr. Erickson: ... the salary schedule was placed  
3 on the table and was discussed as an offer and it  
4 was listed in the summation as an offer from the  
Board.

5 Mr. Duckworth: Would you like to read the minutes,  
6 Mr. Erickson?

7 Mr. Erickson: I would like to review that section.

8 Mr. Duckworth: It does say that it was allowed to  
9 be entered... and it was not a formal proposal?

10 Mr. Erickson: That's what it says at that point,  
11 129.

13 (Second side of tape, 030)

14 21. In September, 1976, the Federation decided it could  
15 accept the salary schedule in question as a compromise schedule.  
16 (Erickson)

17 22. The School Board refused to accede to the Federation's  
18 acceptance of the salary schedule at that time. (Erickson)

19 23. The salary schedule in question related "quite  
20 closely" (second side of tape 030) to the salary schedule  
21 finally settled on. (Erickson)

22 CHARGE AS STATED IN COMPLAINANT'S POST  
23 HEARING BRIEF:

24 ...while the employer was meeting with the Union  
25 during these sessions, the employer representatives  
26 did not have sufficient authority to advance  
27 proposals, to accept proposals, and more importantly,  
28 to bind the employer to agreements reached at the  
29 collective bargaining table.

30 24. This charge was based on the following testimony:

31 Mr. Duffy: Now, does the entire Board negotiate?

32 Mr. Fisher: No.

33 Mr. Duffy: And do you delegate certain individuals  
34 on the Board to do the negotiating?

35 Mr. Fisher: Yes, we do.

36 Mr. Duffy: Are they usually the same people all the  
37 time?

38 Mr. Fisher: No.

1 Mr. Duffy: So a certain number of the Board shows  
2 up at each bargaining session?

3 Mr. Fisher: No, I thought you meant year after  
4 year.

5 Mr. Duffy: No, I mean the contract.

6 Mr. Fisher: Yes, they are.

7 Mr. Duffy: There's five members on the Board.  
How many do you usually send to negotiations.

8 Mr. Fisher: Two.

9 Mr. Duffy: Two, I would assume that actions of the  
Board require Board approval - what, at a majority?

10 Mr. Fisher: Yes.

11 Mr. Duffy: So the two people you send in to negotiate  
12 are not in a position to enter into a contract until  
it's agreed to by the Board?

13 Mr. Fisher: I believe that's the same way the teachers  
14 operate, I believe.

15 Mr. Duffy: Well, that's not response to my question.  
The teachers can speak for the way that they handle it  
themselves. I'm asking the School Board's position.  
You send two people, but those two people are not in  
a position to bind the Board?

16 Mr. Fisher: No. (tape 243)

17 Mr. Duffy: All five members appeared before the fact  
counsel, didn't they?

18 Mr. Fisher: Yes.

19 Mr. Duffy: They would have been able to arrive at  
20 a decision, would they not have, all five of them  
being present?

21 Mr. Fisher: No.

22 Mr. Duffy: Why not?

23 Mr. Fisher: Because we cannot take action unless  
we're at a Board meeting.

24 Mr. Duffy: So whoever shows up at a negotiating  
25 session, since it is not a Board meeting, is not  
empowered to take any action?

26 Mr. Fisher: No. (tape 574)

27 DISCUSSION

28 In determining whether or not the School Board's bargaining  
29 posture regarding MTA Attainment Level 4 constituted an unfair  
labor practice, the following factors were considered:

1. Section 59-1605(3), R.C.M. 1947, clearly states  
2. that the obligation to negotiate in good faith does  
3. not compel either party to agree to a proposal or  
4. require the making of a concession.

5. The School Board's position was neither arbitrary  
6. nor capricious, reasonable arguments having been  
7. presented in support of its position.

8. That a salary schedule based on a MEA Attainment  
9. level was considered inherently objectionable and  
10. inapplicable by the Federation because it was derived  
11. from another union was refuted by the evidence that  
12. in these negotiations the Federation had itself  
13. advanced a salary proposal based on a MEA Attainment  
14. level.

15. At the November 8, 1976, negotiating session the School  
16. Board indicated that a salary proposal was the last offer it  
17. intended to make which would be retroactive to the beginning  
18. of the school year. In determining whether or not this con-  
19. stituted an unfair labor practice, the following factors were  
20. considered:

21. 1. Both parties considered the issue of retroactivity  
22. to be negotiable.

23. 2. This was not the first time retroactivity had  
24. been discussed.

25. 3. No subsequent salary proposal was advanced by the  
26. School Board which did not involve retroactive pay,  
27. and the final settlement in these negotiations provided  
28. for retroactive pay. (Note that the allegation in  
29. this matter was "that on and after November 8, 1976,...").

30. In determining whether or not the discussion between Mr.  
31. Fisher and Ms. Vanderburg constituted an unfair labor practice,  
32. the following factors were considered:

1       1. The incident was precipitated totally by  
2       happenstance; it was in no way a planned, prepared  
3       for, or formal discussion.

4       2. The incident was, as far as the record indicates,  
5       totally isolated, neither recurring with this  
6       employee nor happening at any time to any other  
7       employee; thereby disallowing any allegation of a  
8       continuous, concerted activity of the School Board.

9       3. The incident was trivial in nature, particular  
10      details of the occurrence not being remembered by any  
11      of the participants.

12      In determining whether or not the School Board committed  
13      an unfair labor practice when it initiated a discussion of  
14      a salary schedule but did not formally present it as an offer,  
15      the following factors were considered:

16      1. It was emphasized at the negotiating session at  
17      which the discussion took place that it was not a  
18      salary proposal.

19      2. Several months elapsed between the time the  
20      discussion took place (May) and the time the  
21      Federation decided to accept the "offer" (September).

22      There was no evidence on record that there was any  
23      discussion of the salary schedule in question in  
24      the interim. That the color of negotiations had  
25      changed considerably in the interim was assumed.

26      In determining whether or not the School Board's negotiators  
27      had sufficient authority to advance proposals, to accept  
28      proposals, and to bind the School Board to agreements reached  
29      at the collective bargaining table, the following factors were  
30      considered:

31      1. There was no evidence on record that at any time  
32      the School Board's negotiators lacked sufficient

1 authority to engage in meaningful negotiations.

2. The above notwithstanding, that testimony on  
3 which the charge was based was interpreted as  
4 being that of a layman using a term of art with  
5 which he was not totally familiar.

6 CONCLUSIONS OF LAW

7 The allegations contained in ULP #33-76, charging that the  
8 Board of Trustees of School District #28, Saint Ignatius,  
9 Montana violated Section 59-1605(1)(a) and (o), R.C.M. 1947,  
10 have not been sustained by the Complainant.

11 RECOMMENDED ORDER

12 The charges referred to in ULP #33-76, filed on September  
13 30, 1976, by the Mission Federation of Teachers, Local #3182,  
14 AFT, AFL-CIO, against the Board of Trustees of School District  
15 #28, Saint Ignatius, Montana are hereby dismissed.

16 NOTICE

17 Exceptions may be filed to these Findings of Fact,  
18 Conclusions of Law, and Recommended Order within twenty days  
19 service thereof. If no exceptions are filed with the Board of  
20 Personnel Appeals within that period of time, the Recommended  
21 Order shall become a Final Order. Exceptions shall be addressed  
22 to the Board of Personnel Appeals, 1417 Helena Avenue, Helena,  
23 Montana 59601.

24 DATED this 10<sup>th</sup> day of June, 1977.

25  
26 BOARD OF PERSONNEL APPEALS

27  
28 By Kathryn Walker  
29 Kathryn Walker  
Hearing Examiner